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Kelly A. Heard

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The Impact of Preemption in the NFL Concussion Litigation

KELLY A. HEARD[†]

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I. INTRODUCTION

*You got JACKED UP!*¹

Only a few years ago, National Football League² fans across the nation collectively gasped and uncomfortably laughed when ESPN football analysts—including former NFL players—registered the top ten most vicious hits around the league in their weekly ritual on ESPN's *Jacked Up* segment of *Monday Night Countdown* prior to *Monday Night Football*.³ Adding insult to injury, after each brutal hit, the entire crew jovially shouted, “You got JACKED UP!”⁴ Meanwhile, the incapaci-

[†] Editor-in-Chief, *University of Miami Law Review*; J.D. Candidate 2014, University of Miami School of Law; M.S. 2008, University of Massachusetts, Amherst; B.S. 2006, Boston University. I would like to thank my grandfather (and the best writer in my family), Charlie, my parents, Colleen and Steve, my brother, Mark, Kaitlin Pellerin, and Parker Crouch for their unwavering support. Thank you to my advisor, Professor Dennis O. Lynch, for his guidance. I am also extremely grateful to Sylvia A. Krainin, Paul D. Anderson, Corey Gray, Alexi Haas, Jamie Vanaria, and Charlotte Cassel. Thank you to the Volume 68 Editorial Board of the *University of Miami Law Review* and Farah Barquero for making this possible.

1. *Monday Night Countdown: Jacked Up* (ESPN television broadcast 2006).

2. See *Am. Needle v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010) (“Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams.”).

3. *Monday Night Football* (ESPN television broadcast 2006).

4. See Howard Bryant, *The Risky Business of Football's Future*, ESPN (Oct. 27, 2010),

tated player lay helplessly on the field turf. Now, after a slew of former NFL player suicides,⁵ the laughter has ceased, and the NFL's future hangs in the balance.⁶

The Boston University Center for the Study of Traumatic Encephalopathy⁷ has studied the brains of thirty-five former professional football players.⁸ Of the thirty-five brains that were studied, thirty-four showed signs of chronic traumatic encephalopathy ("CTE"),⁹ a degenerative brain disease that causes confusion, depression, and ultimately dementia due to multiple blows to the head or concussions.¹⁰ CTE is not unique to football players: The disease has also been found in the brains of former hockey players,¹¹ wrestlers,¹² and boxers.¹³ Researchers do

<http://sports.espn.go.com/espn/commentary/news/story?page=bryant/101027> ("'Jacked Up' [is a segment] in which [ESPN] compiled videotape of the biggest, baddest, bone-rattling hits, while commentators declared in unison, as an example, 'Todd Heap, you got JACKED UP!'").

5. See Alan Duke & Chelsea J. Carter, *Junior Seau's Death Classified as a Suicide*, CNN (May 4, 2012, 2:16 AM), <http://edition.cnn.com/2012/05/03/sport/nfl-seau-autopsy/index.html> (recounting the suicides of former NFL linebacker Junior Seau, former Chicago Bears safety Dave Duerson, and former Atlanta Falcons safety Ray Easterling).

6. See Source: *Class-Action Concussion Lawsuit Likely; Could Lead NFL To Go Bankrupt*, SPORTSBUSINESS DAILY (Aug. 24, 2012), <http://www.sportsbusinessdaily.com/Daily/Issues/2012/08/24/Leagues-and-Governing-Bodies/NFL-Concussions.aspx> (stating that if the NFL loses a class-action concussion lawsuit, the NFL could "possibly" go bankrupt); see also Patrick Rishe, *The NFL's Concussion Crisis: Will Fan Interest in Football Eventually Diminish?*, FORBES (Aug. 8, 2012, 12:50 PM), <http://www.forbes.com/sites/prishe/2012/08/08/the-nfls-concussion-crisis-will-fan-interest-in-football-eventually-diminish/> (asking whether an NFL without big hits will draw fans).

7. BOSTON UNIVERSITY CENTER FOR THE STUDY OF TRAUMATIC ENCEPHALOPATHY, <http://www.bu.edu/cste/> (last visited Jan. 4, 2013) (outlining the mission of the Boston University Center for the Study of Traumatic Encephalopathy as researching chronic traumatic encephalopathy and attempting to eliminate its symptoms).

8. See Ann C. McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 BRAIN 43, 59 (2013) (noting that neurologists studied brains of thirty-five former professional football players—thirty-four former NFL players and one Canadian Football League player).

9. See *id.*

10. *What is CTE?*, BOSTON UNIVERSITY CENTER FOR THE STUDY OF TRAUMATIC ENCEPHALOPATHY, <http://www.bu.edu/cste/about/what-is-cte/> (last visited Jan. 4, 2013) ("Chronic Traumatic Encephalopathy (CTE) is a progressive degenerative disease of the brain found in athletes (and others) with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head.").

11. See Alan Schwarz, *Hockey Brawler Paid Price, with Brain Trauma*, N.Y. TIMES, Mar. 3, 2011, at A1 (reporting that CTE was found in the brain of former hockey player Bob Probert).

12. See Peter Applebome, *Politics, Wrestling and Accountability*, N.Y. TIMES, Aug. 26, 2010, at A19 (recounting that after former wrestler Chris Benoit killed his wife, son, and himself, his toxicology report revealed steroids in his body, and his autopsy showed severe brain damage from head injuries).

13. See Ann C. McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy Following Repetitive Head Injury*, 68 J. NEUROPATHOL. & EXP. NEUROL. 709 (2009) (describing signs of CTE in brains of former boxers).

not know the “magic number”¹⁴ of concussions that causes CTE.¹⁵ While CTE cannot be diagnosed with certainty in a living person’s brain, researchers have recently discovered a protein distribution whose effects are consistent with CTE in the brains of living ex-players.¹⁶

The tragic suicides of former NFL players—namely, former NFL linebacker Junior Seau,¹⁷ former Chicago Bears safety Dave Duerson,¹⁸ and former Atlanta Falcons safety Ray Easterling¹⁹—have thrust the devastating impacts of multiple concussions to the forefront of “America’s Sport”²⁰ and have threatened the very essence of the game.²¹

In response to the concussion epidemic, the NFL has implemented new rules designed to reduce concussions²²—some of which have significantly decreased the overall percentage of concussions.²³ Ironically, however, current NFL players accuse the NFL of “trying to promote ‘powder puff’ football” through the new NFL rules.²⁴

14. Press Release, NFL, NFL Outlines for Players Steps Taken to Address Concussions (Aug. 14, 2007), <http://www.nfl.com/news/story/09000d5d8017cc67/article/nfl-outlines-for-players-steps-taken-to-address-concussions> (noting “that there is no magic number for how many concussions is too many”).

15. See McKee et al., *supra* note 8, at 62 (noting that further research is required to determine how many head injuries cause CTE).

16. See Ken Belson, *PET Scan May Reveal C.T.E. Signs, Study Says*, N.Y. TIMES, Jan. 23, 2013, at B16.

17. See Peter Keating, *After the Aftermath*, ESPN (May 17, 2012, 7:38 AM), http://espn.go.com/nfl/story/_id/7930585/nfl-junior-seau-suicide-raises-more-questions-nfl-handling-concussions-espn-magazine (reporting that Seau told a friend, “I’ve had a headache for years. I can’t tell you how many concussions I’ve had.”); see also Gary Mihoces, *Seau Brain Disease Sends Alarm Among Players, Critics*, USA TODAY (Jan. 10, 2013, 7:24 PM), <http://www.usatoday.com/story/sports/nfl/2013/01/10/junior-seau-brain-disease/1822603/> (reporting that Seau suffered from brain trauma).

18. See Alan Schwarz, *Duerson’s Brain Trauma Diagnosed*, N.Y. TIMES, May 3, 2011, at B11 (recounting that after Duerson left a suicide note that said, “Please see that my brain is given to the NFL’s brain bank,” Boston University researchers concluded that Duerson’s brain showed characteristics of chronic traumatic encephalopathy).

19. See *Autopsy: Late Falcon Ray Easterling Had Brain Disease*, USA TODAY (Jul. 27, 2012, 10:32 PM), <http://usatoday30.usatoday.com/sports/football/nfl/story/2012-07-27/Ray-Easterling-autopsy-CTE/56539352/1> (stating that Easterling’s brain had signs of chronic traumatic encephalopathy).

20. Darren Rovell, *It’s Official: NFL is America’s Sport*, CNBC (Oct. 19, 2010, 12:03 PM), http://www.cnbc.com/id/39741267/It039s_Official_NFL_Is_America039s_Sport.

21. See Rische, *supra* note 6 (noting that Americans love violence and predicting that NFL revenues may diminish if rules become “softer”).

22. See NFL.com Wire Reports, *New NFL Rules Designed to Limit Head Injuries*, NFL (Aug. 6, 2010, 5:33 PM), <http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries> (outlining new NFL rules designed to reduce concussions).

23. See Brad Biggs, *Increase in Touchbacks Led to Decrease in Concussions on Kickoffs*, CHI. TRIB. (Feb. 15, 2012), http://articles.chicagotribune.com/2012-02-15/sports/ct-spt-0216-bears-concussions-chicago—20120216_1_concussion-care-elizabeth-pieroth-head-injuries (reporting that after the NFL implemented a new rule moving kickoffs up to the 35-yard line, the number of concussions suffered by players decreased by 50%).

24. See Kevin Van Vacklenburg, *Ed Reed Says Rules Affecting Play*, ESPN (Dec. 3, 2012,

Both Duerson and Easterling were named plaintiffs in concussion lawsuits against the NFL in 2011 and 2012, respectively.²⁵ Due to the mounting number of class-action and individual lawsuits against the NFL, the NFL filed a motion to transfer and consolidate²⁶ the concussion cases pursuant to 28 U.S.C. § 1407.²⁷ On January 31, 2012, the United States Judicial Panel on Multidistrict Litigation granted the NFL's motion and transferred the consolidated concussion cases to the United States District Court for the Eastern District of Pennsylvania under the assignment of the Honorable Anita B. Brody.²⁸ The Panel chose Judge Brody because six related cases were already assigned to her, and "she has the experience to guide this litigation on a prudent course."²⁹ On June 7, 2012, some eighty-one concussion lawsuits involving 2,200³⁰ former players were consolidated into "one mega suit,"³¹ *In re National Football League Players' Concussion Injury Litigation*.³² The mega suit alleged intentional tortious misconduct—namely, fraud, intentional misrepresentation, and negligence—by the NFL.³³

The former players' complaint alleged that the NFL was aware of

10:01 AM), http://espn.go.com/nfl/story/_/id/8704072/ed-reed-baltimore-ravens-says-powder-puff-football-making-nfl-worse (quoting former Baltimore Ravens safety Ed Reed).

25. See Duerson v. Nat'l Football League, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012); Amended Complaint and Demand for Jury Trial, *Easterling v. Nat'l Football League*, No. 11-cv-05209-AB (E.D. Pa. Oct. 5, 2011).

26. Def.'s Mot. for Transfer and Coordination or Consolidation Pursuant to 28 U.S.C. § 1407.

27. See Sheila B. Scheuerman, *The NFL Concussion Litigation: A Critical Assessment of Class Certification*, 8 FIU L. REV. 81, 89 (2012). 28 U.S.C. § 1407 governs multidistrict litigation:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions 28 U.S.C. § 1407(a) (2006).

28. Transfer Order, 842 F. Supp. 2d 1378, 1379 (2012).

29. See *id.*

30. By the time the NFL and the former players reached a proposed settlement, more than 4,500 former players had become involved in the concussion litigation. See Ken Belson, *Concussion Suit To Cost N.F.L. \$765 Million*, N.Y. TIMES, Aug. 30, 2013, at A1.

31. See Greg Tyler, *Concussion Lawsuits Consolidated into One Mega Suit*, THE SPORT DIGEST (June 11, 2012), <http://thesportdigest.com/2012/06/concussion-lawsuits-consolidated-into-one-mega-suit/>. Almost one year after Junior Seau's death, wrongful death lawsuits filed by Seau's family against the NFL were consolidated with the concussion litigation. See *Seau Suit Merged with Pa. Case*, ESPN (Apr. 2, 2013, 6:10 PM), http://espn.go.com/nfl/story/_/id/9125560/junior-seau-suit-merged-pennsylvania-concussion-case.

32. Amended Master Administrative Complaint, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. 2011) [hereinafter *Complaint*].

33. The complaint also names helmet manufacturer Riddell as a co-defendant. See *id.* at 1.

the link between concussions and long-term brain damage but failed to warn its players or implement rules to protect its players from the damaging effects of concussions.³⁴ The complaint described how the NFL voluntarily formed the Mild Traumatic Brain Injury Committee (“MTBI Committee”) to study the effects of concussions in football.³⁵ Then, instead of revealing those effects to football players at all levels, the complaint alleged, the NFL engaged in “a concerted effort of deception and denial.”³⁶

The alleged “campaign of disinformation” was put forth to (a) dispute accepted and valid neuroscience regarding the connection between repetitive traumatic brain injuries and concussions and degenerative brain disease such as CTE; and (b) to create a falsified body of research [that] the NFL could cite as proof that truthful and accepted neuroscience on the subject was inconclusive and subject to doubt.³⁷

New York Giants CEO John Mara called the allegations “ridiculous” and expressed confidence about getting to the bottom of a cause-and-effect pattern between football and concussions.³⁸ Importantly, the former players have possessed a powerful weapon in their offensive arsenal: Congress.³⁹ However, the NFL has utilized its own weapon in the form of a statutory provision. Enter the NFL’s star blocker: Section 301 of the Labor Management Relations Act (“LMRA”).⁴⁰ Section 301 provides that federal law preempts state-law claims related to rights under a collective bargaining agreement and state-law claims substantially dependent upon the interpretation of the collective bargaining agreement.⁴¹

This comment delves into the concussion epidemic that has plagued the NFL in recent years, analyzes how the NFL would have likely prevailed on its federal preemption arguments had the parties not reached a proposed settlement,⁴² and speculates about the future of the NFL’s cov-

34. *Id.* at 3.

35. *Id.* at 32–33.

36. *Id.* at 33.

37. *Id.*

38. Darren Heitner, *New York Giants CEO John Mara: Claim that NFL Knew Concussion Long-Term Effects Is ‘Ridiculous,’* FORBES (Jul. 11, 2012, 9:20 AM), <http://www.forbes.com/sites/darrenheitner/2012/07/11/new-york-giants-ceo-john-mara-claim-that-nfl-knew-of-concussion-long-term-effects-is-ridiculous/>.

39. See Alan Schwarz, *N.F.L. Scolded over Injuries to Its Players*, N.Y. TIMES, Oct. 29, 2009, at B12 (recounting how NFL Commissioner Roger Goodell “faced heated criticism . . . before the House Judiciary Committee” regarding former NFL players’ brain injuries).

40. 29 U.S.C. § 185(a) (2006).

41. 20 RICHARD A. LORD, WILLISTON ON CONTRACTS § 55:58 (4th ed. 2001).

42. On August 29, 2013, court-appointed mediator and former United States District Court Judge Layn Phillips announced that the NFL and the former players had reached a proposed

eted position as “America’s Sport.”⁴³ Part II provides a historical backdrop of the preemption doctrine in labor law and its manifestation in NFL history. Part III examines why the United States District Court for the Eastern District of Pennsylvania would have been poised to grant the NFL’s motion to dismiss the former players’ complaint. Part IV analyzes the proposed settlement⁴⁴ and explains why future concussion lawsuits filed against the NFL will likely be dismissed due to the NFL’s same preemption arguments. Further, Part IV discusses the courses the NFL may pursue to recover from the concussion epidemic and recommends further congressional action to assist the NFL—and society at large—in such endeavors.

II. PRE-GAME: THE PREEMPTIVE IMPACT OF SECTION 301⁴⁵

Section 301 of the Labor Management Relations Act (“LMRA”) states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organiza-

settlement. *See* Press Release, Alternative Dispute Resolution Center, NFL, Retired Players Resolve Concussion Litigation; Court-Appointed Mediator Hails “Historic” Agreement (Aug. 28, 2013) (on file with author). Pursuant to Federal Rule of Civil Procedure 23(e), which governs class-action settlements, the claims of a certified class may only be settled with the court’s approval. *See* FED. R. CIV. P. 23(e). The following requirements must be satisfied in order for the settlement to receive approval:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court’s approval. FED. R. CIV. P. 23(e).

This comment analyzes how the United States District Court for the Eastern District of Pennsylvania likely would have ruled had the parties not reached a proposed settlement. However, the author emphasizes that the proposed settlement has yet to be approved pursuant to Federal Rule of Civil Procedure 23(e).

43. Rovell, *supra* note 20.

44. *See* Press Release, *supra* note 42.

45. *See* Rebecca Hanner White, *Section 301’s Preemption of State-Law Claims: A Model for Analysis*, 41 ALA. L. REV. 377, 377 (1990) (“[T]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action ‘for violation of contracts between an employer and a labor organization.’”) (quoting *Franchise Tax Bd. of State of Cal. v. Constr. Laborers*, 463 U.S. 1, 23 (1983)).

tions, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.⁴⁶

Congress declined to explicitly state whether it intended for Section 301 to preempt state-law claims.⁴⁷ Furthermore, Congress remained silent on a preemption framework in Section 301.⁴⁸ However, Section 301 “has long been interpreted as ousting state-law claims for breach of contract when the contract involved is a collective bargaining agreement.”⁴⁹

The Supreme Court of the United States has “understood [Section] 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address [breach-of-contract] disputes arising out of labor contracts.”⁵⁰ The preemption doctrine stipulates, “federal law preempts state-law [breach-of-contract] claims that are based directly on rights created by [a collective bargaining] agreement, as well as claims substantially dependent on an analysis of the agreement.”⁵¹

The Supreme Court has expressed the twin aims of its Section 301 preemption rationale: uniformity of interpretation of collective bargaining agreements and prevention of interference with those agreements.⁵² Absent either of these twin aims, collective bargaining would serve no legitimate purpose.⁵³ To address threats to the federal labor-contract scheme, the Supreme Court has fashioned the Section 301 preemption rule such that if a state law attempts to define the terms or scope of a collective bargaining agreement, federal labor law preempts that state-law claim.⁵⁴

A. *A Contract Disguised as a Tort is Still a Contract*

As labor law evolved, employees “began making more liberal use of traditional tort theories for actions arising out of their employment”—for instance, wrongful discharge.⁵⁵ Before long, the Supreme Court considered whether Section 301 preemption extended not only to state-law

46. 29 U.S.C. § 185(a) (2006).

47. *See id.*

48. *See id.*

49. *See White, supra* note 45 (citing *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)).

50. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (discussing how the Court has found that the substantive law in Section 301 cases is federal law derived from national labor laws).

51. *LORD, supra* note 41.

52. *See Teamsters*, 369 U.S. at 103.

53. *See id.* at 103–04.

54. *See id.* at 104.

55. *See White, supra* note 45, at 390–91.

contract claims but also to state-law tort claims.⁵⁶ In the landmark Section 301 preemption case of *Allis-Chalmers Corporation v. Lueck*, the Supreme Court analyzed whether a state-law claim "confer[red] non-negotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim [wa]s inextricably intertwined with consideration of the terms of the labor contract."⁵⁷

In this seminal case, the plaintiff-employee sustained an injury and subsequently received disability payments under the parties' collective bargaining agreement.⁵⁸ Instead of following the three-part grievance procedure for disability grievances laid out in the collective bargaining agreement, the plaintiff-employee filed suit in federal court against the defendant-employer for bad-faith state-law actions.⁵⁹

The Court reversed the judgment of the Wisconsin Supreme Court and held that the plaintiff-employee's state-law tort claim was preempted by Section 301 because it was substantially dependent upon the collective bargaining agreement.⁶⁰ "Any other result," Justice Blackmun wrote, "would elevate form over substance and allow parties to evade the requirements of [Section] 301 by relabeling their contract claims as claims for tortious breach of contract."⁶¹

First, the Court found that the implied duty of the defendant-employer to act in good faith in regard to disability payments was "tightly bound with questions of contract interpretation that must be left to federal law."⁶² Whether the defendant-employer had an implied duty to act in good faith and whether it breached that duty are questions of federal contract interpretation.⁶³ The provision implicated in the collective bargaining agreement referred to "any insurance-related issues that may arise."⁶⁴ Thus, adjudication of the state-law claim would require interpretation of the collective bargaining agreement.⁶⁵

Second, the Court found that the state-law claims were preempted because both the right at issue and the defendant-employer's obligation to act in good faith originated from and were defined by the collective bargaining agreement.⁶⁶ Therefore, because a court must interpret the

56. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

57. *Id.*

58. See *id.* at 204.

59. See *id.* at 206.

60. See *id.* at 220-21.

61. *Id.* at 211.

62. *Id.* at 215.

63. See *id.*

64. *Id.*

65. See *id.* at 216.

66. See *id.* at 218.

collective bargaining agreement to analyze the right at issue and the defendant-employer's obligation to act in good faith, the state-law claims were preempted.⁶⁷

Lastly, the Court touched upon the utmost importance of arbitration "in our 'system of industrial self-government.'"⁶⁸ Without arbitration, the purpose of collective bargaining would be lost. If the state-law claim had not been preempted, "perhaps the most harmful aspect" would be that the plaintiff-employee could circumvent the previously negotiated grievance procedure.⁶⁹ In this manner, a principal theory of federal labor-contract law—that the arbitrator, not the court, initially interpret the collective bargaining agreement—would be eradicated.⁷⁰

Although the Court denied state-law tort claims from entering the Section 301 preemption gate, the Court was quick to confirm its narrow holding.⁷¹ The Court emphasized that not every state-law claim that relates to a collective bargaining agreement is preempted by Section 301.⁷² Instead, the Court held that "when the resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a [Section] 301 claim, or dismissed as preempted by federal labor-contract law."⁷³

B. Further Extension of Section 301 Preemption to Torts

The Supreme Court has remained loyal to its ruling in *Allis-Chalmers Corp.* and has continued to utilize the empowering preemptory scope of Section 301.⁷⁴ For instance, in *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, the plaintiff-employee, who was injured on the job, brought suit against her defendant-union for its alleged breach of duty of care to warrant a safe working environment for the plaintiff-employee.⁷⁵ The *Hechler* Court vacated and remanded the Eleventh Circuit Court of Appeals' judgment on the grounds that the state-law claim was not preempted by Section 301.⁷⁶ Similar to the state-law tort claim in *Allis-Chalmers Corp.*, which was a contract state-law

67. *See id.*

68. *Id.* at 219 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

69. *Id.*

70. *See id.* at 220.

71. *See id.*

72. *See id.*

73. *Id.*

74. *See Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 862 (1987).

75. *See id.* at 853.

76. *See id.* at 865.

claim disguised as a tort claim, the state-law claim in *Hechler* was also a breach-of-contract claim disguised as a tort claim.

The *Hechler* Court employed the *Allis-Chalmers Corp.* analysis that “the rule that a tort claim ‘inextricably intertwined with consideration of the terms of the labor contract’ is preempted under [Section] 301.”⁷⁷ In *Hechler*, in order to rule on the plaintiff-employee’s breach-of-duty claim, the Court would have had to interpret the collective bargaining agreement to determine an implied duty of care and the scope of that duty.⁷⁸ Once again, the Court utilized the red tape of collective bargaining to underscore the importance of the “system of industrial self-government.”⁷⁹

C. *The Power of the Shield: How the NFL Blocks State-Law Claims*

In labor disputes between the NFL and its players, the question of Section 301 preemption has threatened to damage the NFL shield.⁸⁰ However, the NFL has—for the most part—managed to utilize Section 301 preemption as a safeguard from liability for state-law claims.⁸¹ Over the years, the NFL (or its representative at the time) and the exclusive bargaining agent for the NFL players have engaged in arms-length negotiations to form agreed-upon collective bargaining agreements.⁸² Each collective bargaining agreement reflects changes, but every agreement explicitly provides for player health and safety and grievance procedures for disputes.⁸³

Because the collective bargaining agreements specifically address these previously negotiated issues, the majority of state-law claims filed against the NFL have been preempted by Section 301.⁸⁴ One example of Section 301 preemption involving player safety is the well-known case, *Stringer v. National Football League*.⁸⁵ On a hot July day in 2001, Minnesota Vikings offensive lineman Korey Stringer experienced heat exhaustion during football practice.⁸⁶ The next morning, he suffered a

77. *Id.* at 858 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985)).

78. *See id.* at 862.

79. *Allis-Chalmers Corp.*, 471 U.S. at 219 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

80. *See, e.g.*, *Stringer v. Nat’l Football League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007); *Williams v. Nat’l Football League*, 582 F. 3d 863 (8th Cir. 2009).

81. *See id.*

82. *See* Motion to Dismiss Complaint at 1, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. 2011) [hereinafter *NFL Motion to Dismiss*].

83. *See id.* at 7.

84. *See, e.g.*, *Stringer*, 474 F. Supp. 2d; *Williams*, 582 F. 3d 863.

85. *Stringer*, 474 F. Supp. 2d 894.

86. *See id.* at 898.

heatstroke.⁸⁷ Tragically, Stringer later died from complications related to heatstroke.⁸⁸

Stringer's widow brought suit against the NFL, alleging breach of duty of care to NFL players to reduce risks associated with heatstroke, as well as failure to provide current information to staff in order to prevent heatstroke.⁸⁹ In its preemption analysis, the United States District Court for the Southern District of Ohio followed a two-pronged approach⁹⁰ utilized by the Sixth Circuit Court of Appeals in *DeCoe v. General Motors Corp.*⁹¹ Section 301 preempts a state-law tort claim if either of the following prongs are satisfied: (1) the claim arose from the collective bargaining agreement, or (2) the court's adjudication of the claim is "substantially dependent" on interpretation of the collective bargaining agreement—or is "inextricably intertwined" with the collective bargaining agreement.⁹²

The court reasoned that the NFL failed to satisfy the first prong because the collective bargaining agreement did not contain any provision that bestowed upon the NFL a duty of care to protect NFL players from the possibility of heatstroke.⁹³ Furthermore, the primary question centers on the origin of the duty in question.⁹⁴ Because the NFL—"on its own initiative"—voluntarily released Hot Weather Guidelines to its member teams as a measure to prevent heatstroke, "it is the common law, not the [collective bargaining agreement], that defines the source of the duty at issue."⁹⁵

However, even though the state-law claim did not arise from the collective bargaining agreement, it was nevertheless preempted because it was "inextricably intertwined [with] and substantially dependent" upon the interpretation of specific provisions of the collective bargaining agreement regarding care and treatment of players.⁹⁶ Because "the degree of care owed cannot be considered in a vacuum," the court must look to contractual duties set forth in the collective bargaining agreement with respect to the health and safety of NFL players.⁹⁷

To analyze the NFL's duty of care to NFL players, two specific provisions must be interpreted: the trainers' certification requirement

87. *See id.*

88. *See id.*

89. *See id.* at 899.

90. *See id.* at 903.

91. 32 F. 3d 212 (6th Cir. 1994).

92. *See Stringer*, 474 F. Supp. 2d at 903.

93. *See id.* at 907.

94. *See id.* at 908.

95. *Id.*

96. *See id.* at 909.

97. *See id.* at 910.

process and the contractual duties of the team doctors.⁹⁸ While a state-law claim is not necessarily derived from a collective bargaining agreement, it may still be subject to Section 301 preemption if its resolution is inextricably intertwined with an analysis of the collective bargaining agreement.⁹⁹

The NFL reached a settlement with Stringer's widow in 2009.¹⁰⁰ Following Stringer's death, the NFL implemented changes that brought awareness to the dangers of heat-related illnesses affecting football players.¹⁰¹ For instance, the NFL immediately forbade the use of ephedra, a weight loss drug that can be dangerous when consumed in oppressive heat.¹⁰² The NFL also provided financial support¹⁰³ to the Korey Stringer Institute.¹⁰⁴

In re National Football League Players' Concussion Injury Litigation is strikingly similar to *Stringer*. *Stringer* dealt with NFL player health and safety and emphasized the NFL's voluntary release of Hot Weather Guidelines designed to prevent the very heatstroke from which Stringer died. Similarly, the former players' complaint in the concussion litigation involved NFL player health and safety and focused on the NFL's voluntary undertaking of studying concussions in football.¹⁰⁵

The NFL is no stranger to state-law tort claims brought against it in relation to the concussion epidemic.¹⁰⁶ In *Duerson v. National Football League*, Duerson's estate brought a negligence suit against the NFL for Duerson's CTE and death.¹⁰⁷ The United States District Court for the Northern District of Illinois employed the same analysis as in *Stringer*: "Even if the NFL's duty arises apart from the [collective bargaining agreements], therefore, the necessity of interpreting the [collective bargaining agreements] to determine the standard of care still leads to preemption."¹⁰⁸ Because Duerson's state-law claims involved a player's physical condition—which corresponded to multiple provisions in the

98. *See id.*

99. *See id.* at 911.

100. *See* Clifton Brown, *Korey Stringer, 10 Years Later: 'Nobody Was Prepared for His Death,'* SPORTING NEWS (Jul. 31, 2011, 4:08 PM), <http://aol.sportingnews.com/nfl/story/2011-07-31/nobody-was-prepared-for-his-death>.

101. *See id.*

102. *See id.*

103. *See id.*

104. *About Us*, KOREY STRINGER, <http://ksi.uconn.edu/about/korey-stringer-institute/> (last visited Feb. 10, 2013) (describing how Stringer's widow founded the Korey Stringer Institute to prevent heat strokes and honor her late husband).

105. Complaint, *supra* note 32, at 32–33.

106. *See* *Duerson v. Nat'l Football League*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012).

107. *See id.* at *1.

108. *Id.* at *4.

collective bargaining agreements—the court found that the claims were substantially dependent upon interpretation of the collective bargaining agreements, and thus, preempted.¹⁰⁹

Similarly, in a separate NFL concussion-related lawsuit, *Maxwell v. National Football League*, the United States District Court for the Central District of California noted that, under the collective bargaining agreement, team doctors assumed chief responsibility for physical care.¹¹⁰ The court reasoned that the relevant provisions of the collective bargaining agreement must be interpreted to determine the NFL's duty of care to NFL players.¹¹¹ Again, the claim was preempted.¹¹²

III. MAMA SAID KNOCK YOU OUT:¹¹³ BREAKING DOWN THE NFL'S GAME PLAN

Although a court carefully considers issues of Section 301 preemption on a case-by-case basis, the NFL's track record of preemption cases increases the NFL's chances that the court would have granted its motion to dismiss. In its reply memorandum, the NFL underscored a "wall of precedent finding preempted virtually identical claims [to the claims the former players had brought] against the NFL."¹¹⁴

A. *The NFL's X's and O's*

All of the former players' claims against the NFL involved either negligence or fraud.¹¹⁵ Fortunately for the NFL, all of these negligence and fraud claims corresponded to a particular provision of the collective bargaining agreements: player medical care provisions; rule-making and player safety rules provisions; grievance procedures; and player benefits provisions.¹¹⁶ To resolve the state-law claims, the court would have been compelled to interpret these collective bargaining agreement provisions

109. *See id.* at *5–6.

110. *See Maxwell v. Nat'l Football League*, No. 11–CV–08394 (C.D. Cal. Dec. 8, 2011).

111. *See id.*

112. *See id.*

113. LL COOL J, MAMA SAID KNOCK YOU OUT (Def Jam 1991) (a hip-hop song describing "knocking out" critics).

114. Reply Brief of Defendant at 15, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. 2011) [hereinafter NFL Reply Brief].

115. *See* Complaint, *supra* note 32, *passim* (listing former players' charges against the NFL for negligence and fraud: action for declaratory relief – liability, medical monitoring, wrongful death and survival actions, fraudulent concealment, fraud, negligent misrepresentation, negligence: pre-1968 conduct of the NFL, negligence: post-1968 conduct of the NFL, negligence: conduct of the NFL (between 1987 and 1993), negligence: post-1994 conduct of the NFL, loss of consortium, negligent hiring, and negligent retention).

116. *See* NFL Motion to Dismiss, *supra* note 82, at 12.

to determine the duty of the NFL to the former players. Thus, preemption would have been imminent.

1. FIRST DOWN: A PLAY OUT OF THE *STRINGER* PLAYBOOK

Stringer and its progeny would have sacked the former players' negligence and fraud claims. According to the *Stringer* analysis, Section 301 preempts a state-law claim if the claim arose from the collective bargaining agreement or the court's adjudication of the claim is "substantially dependent" on the interpretation of the collective bargaining agreement—or is "inextricably intertwined" with the collective bargaining agreement.¹¹⁷

The former players attacked the NFL's duty of care in the exact form of the *Stringer* case. Here, the players argued that because the NFL voluntarily created a committee dedicated to the study of concussions in football, "the NFL affirmatively assumed a duty to use reasonable care in the study of concussions and post-concussion syndrome in NFL players; the study of any kind of brain trauma relevant to the sport of football; the use of information developed; and the publication of data and/or pronouncements from the [Committee]."¹¹⁸

This argument is practically identical to that which was put forth in *Stringer*: The NFL voluntarily released Hot Weather Guidelines to its teams to prevent heatstroke; therefore, "it is the common law, not the [collective bargaining agreement], that defines the source of that duty."¹¹⁹ Likewise, here, the former players may have prevailed in convincing the court that the claims did not arise from the collective bargaining agreements. However, preemption would still be likely. Even if the court found that the negligence and fraud claims did not arise from the collective bargaining agreements, the claims would most likely have been preempted because they are "inextricably intertwined and substantially dependent" upon interpretation of specific provisions of the collective bargaining agreements.¹²⁰

To determine the NFL's duty of care to NFL players in order to adjudicate the claims, a court must look to—and interpret—the collective bargaining agreements.¹²¹ As the *Stringer* Court noted, the NFL's duty of care "cannot be considered in a vacuum."¹²² The NFL likely would have persuaded the court of this argument when it pointed to the multiple provisions in the collective bargaining agreements that set forth

117. See *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 903 (S.D. Ohio 2007).

118. Complaint, *supra* note 32, at 33.

119. *Stringer*, 474 F. Supp. 2d at 908.

120. See *id.* at 909.

121. See *id.* at 910.

122. *Id.*

player health and safety, grievance procedures, and player benefits that require interpretation of the collective bargaining agreements to determine the NFL's duty of care to former players.¹²³

2. SECOND DOWN: PLAYER HEALTH AND SAFETY PROVISIONS

The NFL produced multiple provisions from the collective bargaining agreements that explicitly address player health and safety.¹²⁴ Accordingly, the collective bargaining agreements "address in detail issues relating to assessment, diagnosis, and treatment of player injuries."¹²⁵ The player health and safety provisions place principal responsibility on team doctors to determine a player's physical condition and recovery time; medical and hospital care for the player after suffering an injury while performing services under the contract; team requirements for board-certified orthopedic surgeons; trainer certification by the National Athletic Trainers Association; and additional doctors and an ambulance on site during games.¹²⁶

The NFL's duty of care to NFL players can be determined only by an interpretation of the collective bargaining agreements. The *Allis-Chalmers Corp.* Court reasoned that the employer's obligation to act in good faith had to be interpreted by the collective bargaining agreement.¹²⁷ Applying this rule, the *Stringer* Court reasoned that to determine the NFL's duty of care, the court would have to interpret the provisions of the collective bargaining agreement related to the trainers' certification process and the contractual duties of the team doctors.¹²⁸

Similarly, here, in order to analyze whether the NFL owed a duty of care to former players, the court would have had to interpret the relevant provisions of the health and safety provisions in the collective bargaining agreements.¹²⁹ Thus, the collective bargaining agreements are "the only logical source" to determine whether the NFL breached a duty of care.¹³⁰ The *Stringer* Court noted the significance of looking to a specific provision of the collective bargaining agreement to clarify its analysis,¹³¹ and the court here would likely have done the same. For the sake of simplicity, consider the provision that stipulates trainer certification by the National Athletic Trainers Association. If the trainers are fully

123. See NFL Motion to Dismiss, *supra* note 82, at 12.

124. See *id.*

125. *Id.*

126. See *id.* at 12–13.

127. See *supra* Part II.A.

128. See *supra* Part II.C.

129. NFL Motion to Dismiss, *supra* note 82, at 19.

130. *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 901 (S.D. Ohio 2007).

131. See *id.* at 910.

taught how to address players' concussions, then the NFL's duty of care owed to the NFL players in studying concussions in football decreases.¹³² However, if the trainers lack proper education and training to address players' concussions, then the NFL's duty of care owed to the NFL players in studying concussions in football significantly increases.¹³³ Although both the NFL and the former players dispute the NFL's duty of care owed to the former players,¹³⁴ preemption effectively eliminates the dispute. The court cannot adjudicate the negligence and fraud claims without interpreting the particular provisions of the collective bargaining agreement.¹³⁵ Thus, each claim is inextricably intertwined with provisions of the collective bargaining agreements and is therefore preempted.¹³⁶

3. THIRD DOWN: GRIEVANCE PROCEDURES AND PLAYER BENEFIT PROVISIONS

Significantly, collective bargaining agreements between the NFL clubs and the NFL players have included an arbitration provision.¹³⁷ That provision stipulates "that all disputes involving 'the interpretation of, application of, or compliance with, any provision of' the [collective bargaining agreements], player contracts, or any applicable provision of the Constitution 'pertaining to terms and conditions of employment of NFL players,' will be resolved in accordance with agreed-to arbitration procedures."¹³⁸ The former players "do not even address the role of arbitration in federal labor law—let alone contest that it requires dismissal of preempted claims."¹³⁹ If the court allowed the former players to circumvent collectively bargained grievance procedures, the court would have rendered collective bargaining—and arbitration—futile.¹⁴⁰ Because the Supreme Court has placed the highest significance upon arbitration "in our 'system of industrial self-government,'" ¹⁴¹ the court would be extremely unlikely to allow a class of plaintiffs to bypass a chief tenet of federal labor-contract law.

132. *See id.*

133. *See id.*

134. *See* NFL Reply Brief, *supra* note 114, at 3 ("[S]tarkly different views of the relevant CBA provisions advanced by Plaintiffs and the NFL in their filings to date surely constitute such a dispute.").

135. *See, e.g.,* Int'l Bhd. of Elect. Workers v. Hechler, 481 U.S. 851, 861–62 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218 (1985).

136. *See, e.g.,* Allis-Chalmers Corp., 471 U.S. at 218; Hechler, 481 U.S. at 861–62.

137. *See* NFL Motion to Dismiss, *supra* note 82, at 10.

138. *Id.*

139. NFL Reply Brief, *supra* note 114, at 27.

140. *See, e.g.,* Hechler, 481 U.S. at 862; Allis-Chalmers Corp., 471 U.S. at 220.

141. *See* Allis-Chalmers Corp., 471 U.S. at 219.

Additionally, the collective bargaining agreements also contain provisions that provide rights to former players regarding compensation and benefits.¹⁴² The collective bargaining agreements contain provisions related to player injury protection benefits and an agreement to effectuate a plan that affords benefits to retirees suffering from dementia.¹⁴³ Accordingly, the former players' negligence and fraud claims arose from the collective bargaining agreements because the court would have been required to interpret these provisions to decide whether the former players "reasonably relied" on the NFL's representations.¹⁴⁴ Therefore, like the Supreme Court in *Allis-Chalmers Corp.*, this court would have likely deferred to the collective bargaining agreements. The former players' state-law claims arose from the collective bargaining agreements and could not be adjudicated without interpretation of the aforementioned provisions of the collective bargaining agreements.¹⁴⁵

4. FOURTH DOWN: THE CONCUSSION CHRONICLES

The NFL is quite familiar with concussion litigation brought by former players, and the NFL has enjoyed success with its Section 301 preemption game plan.¹⁴⁶ Duerson already attempted to separate state-law claims of negligence from the collective bargaining agreements, but the court declined to stray from the *Stringer* analysis.¹⁴⁷

Duerson's story is identical to the other former players in *In re National Football League Players' Concussion Injury Litigation*. Duerson and his former NFL player colleagues all sustained concussions throughout their playing careers and played through the concussions because they did not understand the consequences.¹⁴⁸ In *Duerson*, as in *In re National Football League Players' Concussion Injury Litigation*, Duerson's estate alleged that the NFL breached its duty to Duerson by failing to maintain his safety.¹⁴⁹ While Duerson's estate claimed this

142. See NFL Reply Brief, *supra* note 114, at 10.

143. See *id.* at 23. Established in 2007 by the NFL and the National Football League Players Association ("NFLPA"), the 88 Plan provides benefits to eligible retirees who are "vested" under the Bert Bell/Pete Rozelle NFL Retirement Plan and suffer from dementia. See 88 Plan Overview, NFL PLAYER CARE, <https://www.nflplayercare.com/88PlanOverview.aspx> (last visited Oct. 6, 2013). In 2010, the NFL and the NFLPA added amyotrophic lateral sclerosis ("ALS"), or Lou Gehrig's Disease, to the 88 Plan. See Gregg Rosenthal, *NFL, Union Agree to Cover ALS Within "88 Plan,"* PROFOOTBALLTALK (Oct. 18, 2010, 3:56 PM), <http://profootballtalk.nbcsports.com/2010/10/18/nfl-union-agree-to-cover-als-within-88-plan/>.

144. See NFL Reply Brief, *supra* note 114, at 24.

145. See *Allis-Chalmers Corp.*, 471 U.S. at 218.

146. See *Duerson v. Nat'l Football League*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012).

147. See *id.* at *6.

148. See *id.* at *1.

149. See *id.* at *3.

duty was independent from the collective bargaining agreements, the court reasoned, “[e]ven if the NFL’s duty arises apart from the [collective bargaining agreements], therefore, the necessity of interpreting the [collective bargaining agreements] to determine the standard of care still leads to preemption.”¹⁵⁰

In *In re National Football League Players’ Concussion Injury Litigation*, the former players would likely not have been able to tackle the *Duerson* preemption barrier. The former players asserted state-law negligence and fraud claims against the NFL, which explicitly related to particular provisions in the collective bargaining agreements.¹⁵¹ Even if the former players could have demonstrated that the claims existed apart from the collective bargaining agreements, the court would likely have found that to adjudicate the claims, it would have been required to interpret the corresponding provisions of the collective bargaining agreements.¹⁵²

In *Duerson*, “the [collective bargaining agreement] provisions relating to player medical care and safety [were] directly relevant to the particular duty at issue.”¹⁵³ The same reasoning applies here. The former players’ state-law negligence and fraud claims directly related to the same player medical care and safety provisions of the collective bargaining agreements.¹⁵⁴ The court could not resolve these state-law claims without interpreting these provisions.

Furthermore, *Maxwell v. National Football League* also provides the NFL with further precedent for its Section 301 preemption argument.¹⁵⁵ In *Maxwell*, the court held that the former players’ state-law negligence claims were preempted because the collective bargaining agreement included a provision that provided that team doctors assumed chief responsibility for players’ physical care; thus, the court would have to interpret that provision to adjudicate the claims.¹⁵⁶ Here, the NFL pointed to this exact provision in reference to the former players’ negligence and fraud claims.¹⁵⁷ The preemption doctrine mandates that the former players’ claims would have been preempted by Section 301.¹⁵⁸

150. *Id.* at *4.

151. See NFL Motion to Dismiss, *supra* note 82, 7–11.

152. See *Duerson*, 2012 WL 1658353, at *4.

153. *Id.* at *5.

154. See NFL Motion to Dismiss, *supra* note 82, 7–9.

155. No. 11–CV–08394 (C.D. Cal. Dec. 8, 2011).

156. See *id.*

157. See NFL Motion to Dismiss, *supra* note 82, 7–9.

158. See *Maxwell*, No. 11–CV–08394 (C.D. Cal. Dec. 8, 2011).

B. *Time Out: Offensive Scheme and External Influences*

The crux of the former players' complaint was that the NFL formed the MTBI Committee to study the long-term effects of concussions.¹⁵⁹ Specifically, the former players alleged that the NFL "was aware of the evidence and the risks associated with repetitive traumatic brain injuries . . . but deliberately ignored and actively concealed the information from the [former players] and all others who participated in organized football at all levels."¹⁶⁰ In essence, the former players alleged that the NFL embarked upon a "misinformation campaign" about the serious long-term damage of concussions.¹⁶¹ The former players' primary obstacle was overcoming Section 301 preemption of its negligence and fraud claims. Even if the former players rushed the preemption barrier, however unlikely it may be, they may have had the opportunity to expose "the proverbial smoking gun."¹⁶² In November 2012, it was reported that an NFL retirement board awarded disability benefits to three players, noting a link between football and brain injuries.¹⁶³ The report "could [have been] embarrassing to the NFL, or potentially damage its defense of the lawsuits it faces from former players."¹⁶⁴ Furthermore, in October 2012, the former players filed a brief in response to the NFL's motion to dismiss and rejected the NFL's contention that the court would have to interpret provisions of the collective bargaining agreements to adjudicate the former players' state-law claims.¹⁶⁵ The former players argued that their claims—"which turn[ed] on the NFL's voluntary actions, public statements, and special relationship with [the former p]layers—ar[o]se from historical actions, not [collective bargaining agreement] duties."¹⁶⁶

Additionally, the former players asserted that many of them were not even covered under the collective bargaining agreements, none of which were in effect before 1968 and between 1987 and 1993.¹⁶⁷ Expert William Gould, a Stanford University law professor and ex-chairman of the National Labor Relations Board, agreed with the former players that they were not covered by the collective bargaining agreements: "The retirees are not employees under the [collective bargaining agreements]

159. See Complaint, *supra* note 32, at 33.

160. *Id.* at 1.

161. See *id.*

162. Staff reports, *Report: NFL Retirement Board Tied Head Injuries to Disability*, BOSTON GLOBE (Nov. 16, 2012), <http://www.bostonglobe.com/sports/2012/11/16/report-nfl-retirement-board-tied-head-injuries-disability/CkjXgFjmvRM3ed5TsE1dvl/story.html>.

163. See *id.*

164. *Id.*

165. See Reply Brief of Plaintiff at 2, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. 2011) [hereinafter *Players' Reply Brief*].

166. *Id.*

167. See *id.* at 9.

and the National Labor Relations Act. There's no standard set for resolution of these kinds of issues under the [collective bargaining agreement]."¹⁶⁸ However, the NFL has had success in cases where former players have been found to be parties to the collective bargaining agreement.¹⁶⁹

Additionally, in their respective reply briefs, both the former players and the NFL relied on a seminal case from the Third Circuit Court of Appeals, *Kline v. Security Guards, Inc.*¹⁷⁰ In *Kline*, an employer took surveillance video of its employees.¹⁷¹ The employees then sued the employer on several state-law causes of action.¹⁷² The Third Circuit held that although the state-law claims related to job security, they were not preempted.¹⁷³ The collective bargaining agreement mentioned job security, but the collective bargaining agreement failed to mention any provisions related to surveillance.¹⁷⁴

The former players utilized *Kline* to argue that neither the former players nor the NFL put forth an interpretation of any collective bargaining agreement clause.¹⁷⁵ Therefore, the former players argued, preemption was inappropriate.¹⁷⁶ In contrast, the NFL distinguished the present facts from *Kline*.¹⁷⁷ The collective bargaining agreement in *Kline* did not mention surveillance.¹⁷⁸ Conversely, here, the collective bargaining agreements mention duties in reference to conditions of work safety—specifically, neurological warnings to players, rules about returning to the game after injuries, and concussion protocols.¹⁷⁹

Kline emerged throughout oral argument on the NFL's motion to dismiss, which was held on April 9, 2013 before the Honorable Anita B. Brody.¹⁸⁰ Judge Brody emphasized that the main issue was how specific a collective bargaining provision must be to preempt state-law claims.¹⁸¹

168. Jacquelyn Martin, *Concussion Lawsuits Are Next Big U.S. Litigation*, USA TODAY (Jun. 30, 2012), <http://usatoday30.usatoday.com/sports/football/nfl/story/2012-06-30/concussion-lawsuits-are-next-big-US-litigation/55948928/1>.

169. See *supra* Part II.C.

170. *Kline v. Sec. Guards, Inc.*, 386 F. 3d 246 (3d Cir. 2004).

171. See *id.* at 250.

172. See *id.*

173. See *id.* at 256.

174. See *id.*

175. See Players' Reply Brief, *supra* note 165, at 13.

176. See *id.*

177. See NFL Reply Brief, *supra* note 114, at 7.

178. See *id.*

179. See *id.*

180. See Oral Argument, In re Nat'l Football League Players' Concussion Injury Litig., No. 2:12-md-02323-AB (E.D. Pa. 2011), available at <https://soundcloud.com/emsable/nfl-preemption-oral-arg-4-9-13>.

181. See *id.* at 30:27.

The former players introduced *Kline* as the controlling case for this issue, and both parties¹⁸² went head-to-head analyzing *Kline* against the present facts. The former players argued that the NFL's implementation of safety rules, safety equipment, helmets, and promotion of violence in football created a heightened duty of care for the NFL to its players.¹⁸³ The former players also argued that the collective bargaining agreements mentioned nothing regarding health or the NFL's duty of care to its players, so the former players' state-law claims must survive preemption.¹⁸⁴

On the other side, the NFL argued that the collective bargaining agreements speak directly to injuries.¹⁸⁵ In fact, the NFL argued that provisions of the collective bargaining agreements mention player health and safety.¹⁸⁶ The NFL also stated that *Duerson* and *Maxwell* likely would have been decided the same way if they had been brought in the Third Circuit based upon Third Circuit precedent.¹⁸⁷ Therefore, the former players' state-law claims must be preempted.¹⁸⁸

Judge Brody stated that she would either agree with the NFL's preemption analysis and grant its motion to dismiss or she would permit the case to move forward.¹⁸⁹ The latter would have been a worst-case scenario for the NFL, which would have been required to turn over injury and concussion-related documents during the discovery process.¹⁹⁰ In this scenario, the NFL's internal concussion-related operations would have been on display for public viewing, and the question of what exactly the NFL knew—or did not know—finally would have been answered.¹⁹¹

C. Congressional Pressure on the NFL

The former players have enjoyed the support of Congress, which

182. See Rick Maese, *NFL Concussion Lawsuits by Retired Players Go Before Federal Judge*, WASH. POST (Apr. 8, 2013), http://articles.washingtonpost.com/2013-04-08/sports/38366429_1_brody-master-complaint-federal-court (describing how the NFL is represented by former U.S. Solicitor General Paul Clement, and the former players are represented by David Frederick, both of whom have argued cases before the Supreme Court).

183. See Oral Argument, *supra* note 180, at 4:43.

184. See *id.* at 19:30.

185. See *id.* at 31:52.

186. See *id.* at 18:29.

187. See *id.* at 17:30.

188. See *id.* at 18:29.

189. See Gary Mihoces, *Judge Breaks Down Arguments in Concussion-Related Suit*, USA TODAY (Apr. 9, 2013, 4:10 PM), <http://www.usatoday.com/story/sports/nfl/2013/04/09/nfl-concussion-lawsuit-federal-judge-anita-brody/2066933/>.

190. See *id.*

191. See *id.*

has repeatedly grilled the NFL about concussion epidemic issues.¹⁹² On October 28, 2009, NFL Commissioner Roger Goodell testified before the House Committee on the Judiciary.¹⁹³ In his testimony, he stated that the NFL was “proud of the affirmative steps [the NFL] has taken in helping [its] retired players in need.”¹⁹⁴ Earlier, Congresswoman Maxine Waters interrupted Goodell’s testimony and accused the NFL of being “an \$8 billion-a-year organization [that has] not taken seriously [its] responsibility to the players.”¹⁹⁵ After the testimony, Waters denounced the NFL for failing to address benefits for former players: “They never admit anything. They never have straight answers. They come and they’re in defensive mode They dance around the issues.”¹⁹⁶

In addition, Congresswoman Linda Sanchez “likened the NFL’s denial of a link ‘between concussion and cognitive decline to the tobacco industry’s denial of the link between cigarette consumption and ill health effects.’”¹⁹⁷ Previously, Sanchez criticized the NFL’s conflict of interest in conducting the concussion studies when she asked, “Hey, why don’t we let tobacco companies determine whether smoking is bad for your health or not?”¹⁹⁸ Finally, at the end of 2009, the NFL admitted, “It’s quite obvious from the medical research that’s been done that concussions can lead to long-term problems.”¹⁹⁹ In 2012, Sanchez requested a return to the concussion epidemic discussion and proposed a “comprehensive national dialogue on the effects of brain injuries.”²⁰⁰ Congress may be credited with the NFL’s admission that concussions cause long-term consequences,²⁰¹ as well as NFL rule changes. Although these congressional accreditations would have been useful to the former players in the discovery process, they do not garner support for the argument against Section 301 preemption.

As the NFL has stated, “The league’s [preemption] argument has

192. Tom Goldman, *House Hears Testimony on Football, Head Injuries*, NPR (Oct. 28, 2009, 4:00 PM), <http://www.npr.org/templates/story/story.php?storyId=114253880>.

193. See *Legal Issues Relating to Football Head Injuries: Hearing Before the H. Comm. on the Judiciary* (2009) (statement of Roger Goodell, Commissioner, National Football League).

194. *Id.*

195. See Goldman, *supra* note 192.

196. Graham Bensinger, *Maxine Waters Blasts NFL*, HUFFINGTON POST (Nov. 24, 2009, 11:57 PM), http://www.huffingtonpost.com/graham-bensinger/maxine-waters-blasts-nfl_b_370061.html.

197. John Culhane, *Concussions and Cigarettes*, SLATE (Jul. 26, 2011, 1:19 PM), http://www.slate.com/articles/sports/sports_nut/2011/07/concussions_and_cigarettes.htm.

198. Alan Schwarz, *N.F.L. Suspends Its Study on Concussions*, N.Y. TIMES, Dec. 20, 2009, at SP4.

199. Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES, Dec. 21, 2009, at D1.

200. Letter from Linda Sanchez to Lamar Smith (Mar. 26, 2012), available at <http://lindasanchez.house.gov/index.php/press-releases/698-linda-sanchez-calls-for-new-hearings-on-head-injuries-in-wake-of-bounty-gate-march-27-2012> [hereinafter Sanchez Letter].

201. Schwarz, *supra* note 199.

already been accepted by two federal judges in these very litigations, who concluded that the plaintiffs' claims were substantially dependent upon and arose under the various collective bargaining agreements under which the plaintiffs played and therefore [were] preempted by federal labor law."²⁰² Despite the former players' claims of denial and deception against the NFL, the NFL would have likely persuaded the court to apply the same precedential Section 301 preemption analysis that has benefited the NFL in numerous other actions.

D. *Game-Winning Drive: Policy and Preemption*

Without Section 301 preemption in this case, "the exclusivity of union representation and the primacy of the collective bargaining agreement would be diminished."²⁰³ The Supreme Court has clarified that cases involving issues of Section 301 preemption require careful analysis on a case-by-case basis.²⁰⁴ However, the Supreme Court has also specifically held that if a state-law claim is substantially dependent upon a collective bargaining agreement, then federal law pursuant to Section 301 preempts the state-law claim.²⁰⁵

As such, "the lower courts, state and federal, must now be vigilant in recognizing and applying this analysis This realization is essential if the policies animating Section 301 preemption are to be preserved."²⁰⁶ Therefore, the doctrine of *stare decisis* mandates that the court would have ruled that the former players' state-law negligence and fraud claims are preempted under Section 301. Furthermore, the Supreme Court has placed the utmost importance on the arbitration aspect of federal labor law, and the court here would have been unlikely to threaten it.²⁰⁷

Stringer advised that "the degree of care owed cannot be considered in a vacuum."²⁰⁸ The adjudication of the former players' state-law negligence and fraud claims depend on the corresponding provisions of the collective bargaining agreements.²⁰⁹ The collective bargaining agreements are the only source by which the court could rule that the NFL's duty of care owed to the NFL players was augmented or diminished by—for instance—the NFL's voluntary establishment of the MTBI

202. Martin, *supra* note 168.

203. White, *supra* note 45, at 434 (citing *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)).

204. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

205. See *id.* at 220–21.

206. White, *supra* note 45, at 434 (citing *Teamsters*, 369 U.S. 95).

207. See discussion *supra* II.A.

208. *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007).

209. See *id.*

Committee.²¹⁰

The former players' state-law claims encompassed "workplace safety in a unionized setting in which workplace safety issues loom large and have long been the subject of bargaining."²¹¹ Thus, uniform federal labor law preempts the state-law claims.²¹² Without uniform federal labor law, "the NFL would owe different duties to a current or former Seahawk than it owes to a current or former Dolphin, even when the two players are governed by the same labor agreement."²¹³

Furthermore, the NFL rebutted the former players' argument that the former players were not parties to the collective bargaining agreements by pointing out that the former players have brought state-law claims against the NFL for alleged conduct during the former players' NFL careers and their retirement.²¹⁴ Claims involving the NFL's representations to retired players would likely not survive preemption because the court would have been required to interpret provisions of the collective bargaining agreements "to resolve, among other things, whether the retirees reasonably relied on the NFL and the NFL's alleged duty to them."²¹⁵

Although the legal complexities in this case would have warranted a long litigation process,²¹⁶ preemption would have been likely. When discussing the preemption doctrine, it is easy to become immersed in federal labor law policy. As such, it is essential that throughout this preemption discussion, we remember that former players who dedicated their best years to the gridiron are now struggling with debilitating illness.²¹⁷ They need a remedy *now*.²¹⁸ From the beginning of the NFL concussion litigation, Judge Brody encouraged the NFL and the former players to negotiate a settlement.²¹⁹ Even before Judge Brody ordered

210. *See id.*

211. NFL Reply Brief, *supra* note 114, at 1.

212. *See id.*

213. *Id.*

214. *See id.* at 24.

215. *Id.* at 25.

216. *See* Rishe, *supra* note 6.

217. *See* Melissa Segura, *The Other Half of the Story*, SPORTS ILLUSTRATED (Sept. 10, 2012), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1205982/1/index.htm> (describing how two-time Super Bowl Champion quarterback Jim McMahon "drops to his knees, breaks into a cold sweat and turns a ghostly white, complaining of a pain that he compares to having an ice pick in his brain").

218. *See* Andrew Brandt & Sol Weiss, *NFL Concussion Litigation Resolved: Inside the Settlement*, YOUTUBE (Sept. 27, 2013), <http://www.youtube.com/watch?v=pLy9X-7gnT4> (quoting Sol Weiss, who represented the former players in the concussion litigation: "[Litigation] was inconsistent with our goal of trying to get people paid who were sick and get them paid quickly, so we decided to talk [about a settlement].").

219. Order, No. 2:12-md-02323-AB (E.D. Pa. 2011) ("The settlement holds the prospect of avoiding lengthy, expensive and uncertain litigation, and of enhancing the game of football.").

the parties to mediation,²²⁰ experts hypothesized that “[NFL] owners could handle the tab.”²²¹

IV. THE FIFTH QUARTER: SETTLEMENT, SUBSEQUENT SUITS, AND STRATEGY

On August 29, 2013, two months after Judge Brody ordered the parties to mediation, court-appointed mediator Layn Phillips announced that the NFL and more than 4,500²²² former players had reached a “historic agreement.”²²³ The proposed settlement—pending court approval²²⁴—provides that the NFL will pay \$765 million²²⁵ for medical benefits and injury compensation for the former players, research, and litigation costs.²²⁶ Retired players who are determined to have a “cognitive injury” by an objective, independent doctor will receive financial benefits.²²⁷ In order for Judge Brody to approve the proposed settlement, she must find that it is “fair, reasonable, and adequate,” considering the claims, defenses, costs, time, and benefits.²²⁸ To do so, Judge Brody will

220. See Maryclaire Dale, *Judge Orders NFL, Retired Players to Negotiate*, ASSOCIATED PRESS (Jul. 8, 2013), available at <http://bigstory.ap.org/article/judge-orders-nfl-retired-players-negotiate> (discussing how Brody ordered both sides to negotiate and appointed former United States District Court Judge Layn Phillips to mediate).

221. See Paul M. Barrett, *Will Brain Injury Lawsuits Doom or Save the NFL?*, BUSINESSWEEK (Jan. 31, 2013), <http://www.businessweek.com/articles/2013-01-31/will-brain-injury-lawsuits-doom-or-save-the-nfl#p5> (“Even hypothesizing an impressive-sounding \$5 billion settlement, the owners could handle the tab. Paid out over 25 years to cover players’ needs as they arise, such a settlement would work out to \$200 million a year. Divide that 32 ways, and each team would face a hit of \$6.25 million a year.”).

222. See Press Release, *supra* note 42 (noting that the proposed settlement includes “all players who have retired as of the date on which the Court grants preliminary approval to the settlement agreement, their authorized representatives, or family members (in the case of a former player who is deceased).”).

223. See *id.*

224. See FED. R. CIV. P. 23(e). See also Order, *supra* note 219.

225. \$765 million is almost equal to the price tag of the NFL’s Jacksonville Jaguars; the franchise sold for \$760 million two years ago. See Ken Belson, *Explaining The Details of a Deal*, N.Y. TIMES, Aug. 30, 2013, at B16.

226. See Press Release, *supra* note 42. Pursuant to the proposed settlement agree, the NFL agrees to provide the following payments:

- (A) Baseline medical exams, the cost of which will be capped at \$75 million;
- (B) A separate fund of \$675 million to compensate former players who have suffered cognitive injury or their families;
- (C) A separate research and education fund of \$10 million;
- (D) The costs of notice to the members of the class, which will not exceed \$4 million;
- (E) \$2 million, representing one-half of the compensation of the Settlement Administrator for a period of 20 years; and
- (F) Legal fees and litigation expenses to the plaintiffs’ counsel, which amounts will be set by the District Court. See *id.*

227. See *id.*

228. See *id.*

hold a hearing to determine whether to grant initial approval.²²⁹ If she does initially approve the proposed settlement, the class of former players will receive notice and the opportunity to file objections.²³⁰ Lastly, Judge Brody will hold another hearing to determine whether to grant final approval.²³¹

Although many experts consider the proposed settlement a victory for the NFL—which hauls in \$10 billion in revenue per year²³²—the former players received what they needed: “It’s not about \$2 billion, \$4 billion, or \$10 billion; it’s about having the right amount of money to do the deal now and not wait five or ten years for appeals to run out.”²³³ Former Philadelphia Eagles and New England Patriots fullback Kevin Turner was happy with the proposed settlement because it provides financial help now and avoids years of litigation.²³⁴ As for the critics, Turner stated, “There will always be people who said there should have been more, but they are probably not the ones with [Lou Gherig’s Disease] and at home.”²³⁵

In addition, the proposed settlement allows the former players to receive a tangible remedy instead of being denied access to the federal courts due to preemption barriers.²³⁶ Moreover, pursuant to the proposed settlement, the former players are not required to prove any causal link between their current injuries and prior concussions.²³⁷ The former player’s age and the number of years he spent in the NFL are considered for compensation purposes—not his position or number of concussions.²³⁸ Furthermore, because the purpose of a settlement is forward-looking,²³⁹ players who develop health issues in the future will receive benefits that are increased by cost-of-living factors.²⁴⁰

The former players have commended the NFL for doing the right thing.²⁴¹ However, the proposed settlement has allowed the NFL to escape the unearthing of any evidence of what it knew about the effects of concussions in football²⁴² and liability for the claims brought against

229. *See id.*

230. *See id.*

231. *See id.*

232. *See* Belson, *supra* note 30.

233. *See* Brandt & Weiss, *supra* note 218.

234. *See* Belson, *supra* note 30.

235. *See id.*

236. *See* discussion *supra* III.A.

237. *See* Belson, *supra* note 30.

238. *See id.*

239. *See* Brandt & Weiss, *supra* note 218.

240. *See id.*

241. *See id.*

242. *See* Belson, *supra* note 30.

it by the former players.²⁴³ Former players can opt out or reject the settlement in an attempt to break through the preemption barrier and force the NFL to disclose what it did—or did not know—about concussions in football.²⁴⁴ In fact, four former players already did so—just three days after the proposed settlement was announced—when they filed a new concussion lawsuit against the NFL.²⁴⁵ The filing of the new lawsuit suggested that these four former players intended to opt out of the proposed settlement.²⁴⁶ However, after news of their lawsuit broke, these former players clarified their “plan to participate in the [proposed] settlement.”²⁴⁷ While the proposed settlement has closed one chapter of the NFL concussion litigation, the threat of additional lawsuits suggests that the NFL’s concussion epidemic is far from over.

After Junior Seau’s death, friend and former teammate, Mark Walzack, commented, “Junior just didn’t report head injuries. I had (unreported) concussions, too But you just don’t report them. You’re a football player. You’re tough. If you did report stuff like that, next thing you know you’re on waivers.”²⁴⁸ The warrior culture of the NFL that casts players as gladiators in battle must change to defeat the concussion epidemic in the NFL.²⁴⁹

The NFL’s implementation of new rules, including moving up the kick-off line, fining players for helmet-to-helmet hits, and requiring quicker diagnoses of concussions on the sidelines, are, in fact, working.²⁵⁰ However, the culture change mandates a team effort; players must be on board as well.²⁵¹ Many current NFL players resent fining

243. See Press Release, *supra* note 42.

244. See Editorial, *Paying for Brain Damage*, CHI. TRIB. (Sept. 1, 2013), http://articles.chicagotribune.com/2013-09-01/opinion/ct-edit-nfl-20130901_1_brain-damage-repeated-brain-trauma-former-players.

245. Jimmy Williams, Rich Mauti, Jimmy Keyes, and Nolan Franz. Three wives were named as plaintiffs: Chandra Williams, Nancy Mauti, and Billie Keyes. See *Four Ex-NFL Players File New Lawsuit*, ESPN (Sept. 4, 2013, 8:58 AM), http://espn.go.com/nfl/story/_/id/9632135/4-ex-nfl-players-file-new-suit-concussions.

246. See Mike Florio, *Lawyer: New Lawsuit Was Filed in Event Settlement Isn’t Approved*, PROFOOTBALLTALK (Sept. 4, 2013, 7:14 PM), profootballtalk.nbcsports.com/2013/09/04/lawyer-new-lawsuit-was-filed-in-event-settlement-isnt-approved/.

247. See *id.*

248. See LaMar C. Campbell, *NFL Concussion Settlement Raises Questions*, CNNOPINION (Sept. 9, 2013, 6:45 AM), www.cnn.com/2013/09/08/opinion/campbell-nfl-lawsuit/ (former Detroit Lions defensive back stating that he has “already heard from many players who plan to opt out of the current settlement”).

249. Erik Brady & Gary Mihoces, *Seau Brain Disease Sends Alarms Among Players, Critics*, USA TODAY (Jan. 10, 2013, 7:24 PM), <http://www.usatoday.com/story/sports/nfl/2013/01/10/junior-seau-brain-disease/1822603/>.

250. See Ken Belson, *Goodell Speaks of Changes Needed in N.F.L. Culture*, N.Y. TIMES, Nov. 16, 2012, at B13.

251. See *id.*

players for big hits. For instance, recently retired Chicago Bears line-backer Brian Urlacher stated, "It's freaking football. There are going to be big hits."²⁵² Furthermore, reporting a concussion may cost an NFL player his job, so he may be inclined to hide his symptoms.²⁵³

Congress has urged "a comprehensive national dialogue on the effects of brain injuries."²⁵⁴ Even President Obama has weighed in on the concussion epidemic: "I do think we want to make sure that after people have played the game, that they're going to be OK, and I'm glad to see the NFL is starting to take this seriously."²⁵⁵ However, the NFL cannot effectuate sweeping, successful changes on its own initiative.

The NFL has, however, helped to make youth concussion laws a reality in forty-eight states and Washington, DC.²⁵⁶ Now, Congress must push concussion legislation at the professional level. Trends at the professional level of football trickle down to the lower levels of football.²⁵⁷ Education and awareness about the dangers of concussions must start at a high level.²⁵⁸ Commendably, the NFL has provided grants for brain injury research.²⁵⁹ For instance, on September 20, 2012, the NFL announced that it provided a five-year, \$30 million grant to the Sports and Health Research Program of the Foundation for the National Institutes of Health.²⁶⁰ In addition, the NFL recently partnered with General Electric and Under Armour to fund a four-year, \$60 million "Head Health Initiative," which has two elements: (1) a four-year, \$40 million research program to improve diagnoses of brain injuries, and (2) a two-year, \$20 million "open Head Health Challenge" to ask experts to iden-

252. See NATIONAL FOOTBALL LEAGUE, 2013 PLAYER HEALTH & SAFETY REPORT 11 (2013), available at <http://www.nflevolution.com/healthandsafetyreport/> (quoting Robert Cantu, M.D., Co-Director of the Center for the Study of Traumatic Encephalopathy, Boston University School of Medicine: "Has there been a culture change overall? I think the answer is, unquestionably, 'yes.' Could there be more done? Yes. Do all the players get it? No. Do they want to get it? No.") [hereinafter 2013 Player Health & Safety Report].

253. Vaughn McClure, *Urlacher Upset with NFL Flagrant Hit Policy*, CHI. TRIB. (Oct. 19, 2012), http://articles.chicagotribune.com/2010-10-19/sports/ct-spt-1020-bears-urlacher-brian-chic-20101019_1_linebacker-brian-urlacher-big-hits-safety-chris-harris.

254. Daniel Brown & Mark Emmons, *Benching of San Francisco 49-ers' Alex Smith Raises Questions About Concussion Precedent*, MERCURY NEWS (Dec. 9, 2012, 8:39 AM), http://www.mercurynews.com/49ers/ci_22148554/concussion-costs-49ers-alex-smith-his-job (quoting former NFL quarterback Steve Young who stated, "The league has this protocol for head injuries that they really want to gain some momentum. And now (a player) is going to lose his job over it. Probably not a good fact going forward for the head-injury efforts.").

255. See Sanchez Letter, *supra* note 200.

256. See Larry Hartstein, *Obama on Concussions: 'Glad NFL is Starting to Take This Seriously'*, CBSSPORTS.COM (Feb. 3, 2013, 4:51 PM), <http://www.cbssports.com/nfl/blog/nfl-rapidreports/21632708/obama-on-concussions-glad-nfl-is-starting-to-take-this-seriously>.

257. See 2013 Player Health & Safety Report, *supra* note 252.

258. See *id.*

259. See *id.*

260. See *id.*

tify better procedures to improve diagnoses of brain injuries.²⁶¹ However, to accomplish prolific and comprehensive reform, the NFL needs Congress to act.

The NFL's need for congressional intervention begs the question: Where is the Occupational Safety and Health Administration ("OSHA")? In 1970, Congress created OSHA, a part of the United States Department of Labor, "to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance."²⁶² OSHA's mission demands its presence throughout this concussion epidemic to work with the NFL to ensure player health and safety immediately. The proposed settlement will likely reduce congressional pressure on the NFL at present, but the concussion epidemic affects society as a whole. Triumph over this epidemic necessitates congressional involvement.

V. CONCLUSION

The tragic suicides of Junior Seau, Dave Duerson, and Ray Easterling were not in vain. They brought awareness to the NFL concussion epidemic and a resolution for their football brothers and the families they left behind. However, the NFL concussion epidemic has not reached its conclusion. The NFL will continue to block additional former players' state-law claims with its Section 301 preemption shield. Although significant progress has been made in research and development regarding concussions in football, the NFL is still vulnerable to threats of litigation due to a warrior culture that remains intact.

The NFL concussion litigation presents itself against an established backdrop of Section 301 preemption precedent. Because the former players' state-law claims were inextricably intertwined with the collective bargaining agreements—and thus required interpretation of the collective bargaining agreements for adjudication—federal law would have preempted the state-law claims. Still, so long as NFL players suffer concussions, the NFL is open to attack of future litigation. The NFL concussion epidemic affects all levels of football and future generations. A health crisis this vast requires education and awareness, and most importantly, congressional involvement, to impact change today.

261. *See id.*

262. *See id.*